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In the Defense of Freedom and Equality: The American Civil Liberties Union Past, Present, and Future

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IN THE DEFENSE OF FREEDOM AND EQUALITY: THE AMERICAN CIVIL LIBERTIES UNION PAST, PRESENT, AND FUTURE*

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The American Civil Liberties Union is accustomed to being the subject of debate and controversy. Usually, the position we have taken in a particular legal case is at issue. Lately, however, disagreements about the fundamental nature of the ACLU's mandate and its proper role have occupied the media spotlight.[1] The criticism essentially charges that the ACLU is abandoning its traditional commitment to free speech and other classic civil liberties and is becoming a "trendy" liberal organization primarily concerned with equality and civil rights.[2]

In addressing what I call this "civil-rights-versus-civil-liberties" critique[3] I do not want to overstate its importance in the overall scheme of the ACLU's work. Of all the criticism we receive, both in the media and in correspondence, the "rights-versus-liberties" line clearly constitutes a small minority position. The vast majority of the press and other critics continue to complain that the ACLU *too* zealously defends free speech

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[1] *See, e.g.*, Dennis Cauchon, *Civil Dispute Within the ACLU: Debate Over Competing Principles*, USA TODAY, Mar. 31, 1993, at 1A; Richard Ostling, *ACLU—Not All That Civil*, TIME, Apr. 26, 1993; Neil A. Lewis, *At A.C.L.U., Free-Speech Balancing Act*, N.Y. TIMES, Apr. 4, 1993, at 16.

[2] The charge of being "trendy" has been leveled, for example, by Nat Hentoff in *Punish the Act—Not the Idea—of Bigotry*, LEG. TIMES, Apr. 5, 1993, at 25.

[3] Harvard Law Professor Alan Dershowitz and writer Nat Hentoff have been two of the most outspoken proponents of this critique. For examples from Professor Dershowitz, see Alan Dershowitz, *The True Test for True Free-Speech Believers*, ROCKY MOUNTAIN NEWS, July 23, 1990, at 42 ("One group that is in danger of being drummed out of the First Amendment Hall of Fame is the American Civil Liberties Union. Until recently, it was a charter member. But over the past few years, it has gotten soft on the First Amendment when it comes to racist, sexist, and homophobic speech on college campuses."); Alan Dershowitz, *Censors Hunt for New Target*, ST. PETERSBURG TIMES, Apr. 21, 1990, at 20A.

For examples from Hentoff, see NAT HENTOFF, FREE SPEECH FOR ME—BUT NOT FOR THEE 164–66 (1992); Nat Hentoff, *ACLU's Civil War on Hate Speech*, SACRAMENTO BEE, Feb. 12, 1993, at B12; Nat Hentoff, *Broadcasts by Big Brother; Fairness Is Not Achieved by Government Regulation of Speech*, WASH. POST, Nov. 6, 1993, at A25; Nat Hentoff, *Scalia Outdoes the ACLU*, WASH. POST, June 30, 1992, at A19; Nat Hentoff, *Susceptible to Abuse; The ACLU's Civil War About "Hate Speech" Crimes*, WASH. POST, Feb. 6, 1993, at A23; *see also* Hentoff, *supra* note 2.

and other traditional civil liberties. This is the objection, for example, of the so-called "Communitarian" movement,[4] which recently has gained so much attention and influence. Both President Clinton and Vice President Gore have long been associated with Communitarianism and both men use its rhetoric.[5] Political and academic exponents of Communitarianism regularly assail the ACLU for not caring enough about collective or community concerns, and for being too staunchly committed to individual freedom.[6]

Although recently endorsed by Democrats, the Communitarian critique is a variation on the familiar and ongoing criticism we receive from many conservatives who complain that civil libertarians are insufficiently respectful of what they consider the community or group rights of, for example, the "conventional nuclear family" or of dominant religious or political factions. For conservatives, these rights often include the right to impose draconian crime control measures, the right to government-supported religious exercises, and the right to maintain so-called "traditional family values" by suppressing expression that challenges such values, including allegedly "immoral" or "indecent" art that explores such themes as homoeroticism and feminism.

From the opposite end of the political spectrum, our liberal and left-wing critics regularly complain that we overlook what they consider to be the collective rights of certain groups or communities in our allegedly over-zealous defense of individual rights. The only difference between the critique from the left and the critique from the right is in the nature of the particular groups we are accused of shortchanging. According to many of our liberal and left-wing critics, we wrongly defend the

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[4] As articulated in the Communitarian platform, authored by Amitai Etzioni, William Galston and Mary Ann Glendon, Communitarians' "first and foremost purpose is to *affirm the moral commitments of parents, young persons, neighbors, and citizens*, to affirm the importance of the communities within which such commitments take shape and are transmitted from one generation to the next." *The Responsive Communitarian Platform: Rights and Responsibilities, in* AMITAI ETZIONI, THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA 251, 266 (1993). For a discussion of the principles of Communitarianism by one of its leading advocates see Cass R. Sunstein, *The Republican Civic Tradition: Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988). For an analysis of the Communitarian critique see Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6, 7 (1990).

[5] For example, in a speech that garnered much attention, President Clinton asserted, "We cannot . . . repair the American community and restore the American family until we provide the structure, the values, the discipline and the reward that work gives." E.J. Dionne, Jr., *Clinton's Bully Pulpit*, WASH. POST., Nov. 16, 1993, at A21. *See also* Ruth Shalit, *Family Mongers; 'Family Values' and Politics*, NEW REP., Aug. 16, 1993, at 12; Amitai Etzioni, *Clinton is Talking Like One, But is He a Communitarian?* NEWSDAY, May 17, 1993, at 39.

[6] *See, e.g.*, AMITAI ETZIONI, PUBLIC POLICY IN A NEW KEY 31–36 (1993) (commenting that some, such as the ACLU, "feel so strongly about the primacy of rights and so resentful of the implications of social responsibilities that they are blind to the peculiarity of the positions they advance.").

free speech rights of those who speak out in ways they deem harmful to oppressed minority groups. For example, the National Lawyers Guild condemned what it called our "poisonous evenhandedness" when the ACLU defended the rights of neo-Nazis to demonstrate peacefully in Skokie, Illinois, in the late 1970s.[7] Some civil rights advocates sharply criticize the ACLU for opposing restrictive hate speech codes on college campuses.[8] Many feminists, most prominently Andrea Dworkin and Catharine MacKinnon, bitterly denounce us for defending free speech rights for what they condemn as "pornography."[9] And recently, my own state's affiliate, the New York Civil Liberties Union, was criticized by some gay rights advocates for defending the First Amendment rights of the Ancient Order of Hibernians to choose whom they would include in their St. Patrick's Day Parade and whom they would *exclude* from the parade, namely representatives of the Irish Lesbian and Gay Organization.[10]

The foregoing examples are but a small sampling of the ACLU's staunch defense of expression that is deplored across the political spectrum. In light of this work, if you told most ACLU critics—ranging from Andrea Dworkin to Ed Meese—that we are too soft on free speech and too *supportive* of community or group rights, they would have a good laugh. Similarly, those who decry our speech-protective positions on such issues as tobacco advertising, campaign finance, and television violence

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[7] SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 326 (1990). *See also* Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978); Village of Skokie v. National Socialist Party of America, 373 N.E.2d 21 (Ill. 1978); DONALD ALEXANDER DOWNS, NAZIS IN SKOKIE: FREEDOM, COMMUNITY, AND THE FIRST AMENDMENT (1985); JAMES L. GIBSON & RICHARD D. BINGHAM, CIVIL LIBERTIES AND NAZIS: THE SKOKIE FREE-SPEECH CONTROVERSY (1985); ARYEH NEIER, DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE AND THE RISKS OF FREEDOM (1979).

[8] *See, e.g.*, Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 436–37, 457–58, 474 n.155, 476–80; *but see* Nadine Strossen, *Regulating Racist Speech On Campus: A Modest Proposal?* 1990 DUKE L.J. 484, 489–90, 498–500, 539–41, 552–54 (responding to Lawrence's criticisms of the ACLU).

[9] For the Dworkin-MacKinnon analysis of pornography see ANDREA DWORKIN & CATHARINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY (1988); ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1988); Catharine A. MacKinnon, *Frances Biddle's Sister: Pornography, Civil Rights, and Speech*, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 163, 175–77 (1987); CATHARINE A. MACKINNON, ONLY WORDS (1993); Catharine A. MacKinnon, *Pornography As Defamation and Discrimination*, 71 B.U. L. REV. 793 (1991); Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 22–24 (1985).

[10] *See* New York County Board of Ancient Order of Hibernians v. Dinkins, 814 F. Supp. 358, 366–68 (S.D.N.Y. 1993) (holding that denying a permit to a parade because of its expressive content clearly violates the First Amendment); *see also* Maurice Carroll, *Gays Can March; Ruling Fuels St. Pat's Day Parade Flap*, NEWSDAY, Oct. 29, 1992, at 3; Patricia Cohen, *St. Patrick's Ruling; The Parade Must Go On*, NEWSDAY, Feb. 27, 1993, at 11; Deborah Pines, *Denial of Parade Permit Sparks Sharp Questioning at Hearing*, NEW YORK L.J., Feb. 23, 1993, at 1.

would laugh if you told them that the ACLU is willing to sacrifice free speech principles for trendy liberal causes.

It is important to keep this perspective in mind as we consider the opposite critique, the "rights-versus-liberties" critique. This criticism, though infrequent, is important because it cuts directly to the core of our organizational mission. When we are accused of defending individual rights too zealously, that is a sure sign that we are doing a good job. Our work will necessarily provoke that type of criticism since our job is to defend the rights of individuals and groups precisely because they do not enjoy the support of the majority. If our clients were popular, our advocacy would be unnecessary. In contrast, when we are accused of abandoning our mission of championing individual rights, it is a grave charge indeed, and it merits a careful response.

The "civil-rights-versus-civil-liberties" critique, as I see it, has five recurring elements, all of which are based on myths and misconceptions about the ACLU and civil liberties:

First, that the ACLU was founded to defend free speech and recently has expanded its agenda to defend other rights, particularly the rights of various minority groups, including racial minorities, women, lesbians, and gay men.

Second, that there is an inherent conflict between so-called "traditional civil liberties," most importantly, free speech, and so-called "civil rights" or equality rights of groups that have traditionally suffered discrimination. This purported conflict is sometimes described as that between liberty and equality.

Third, that the ACLU cannot vigorously defend liberty if it also defends equality and, therefore, the ACLU must choose between civil liberties and civil rights.

Fourth, that free speech should be absolute and should not be balanced against other rights.

Finally, fifth, that the ACLU should "go back" to defending only civil liberties and leave the defense of civil rights to other organizations, such as the NAACP, the National Organization for Women, and Lambda.

The first premise is historically inaccurate and is inconsistent with the unique and essential role that the ACLU has played, and must continue to play, in our society. To start with, the ACLU was not founded only to defend free speech.[11] From the very beginning, the organization has been concerned with a broad range of fundamental civil liberties and civil rights.[12] Our conception of fundamental rights has always included equal-

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[11] For a discussion of the founding of the ACLU in 1920, see WALKER, *supra* note 7, at 45–47 (1990).

[12] Indeed, the original statement of the ACLU's mission, published in 1921, described its organizational enemy as "the new machinery for the suppression of opinion and of

ity rights, which, like free speech rights, are content neutral, even though they are exercised by members of particular groups. We have always recognized that just as the right to march in a peaceful demonstration does not become a Nazi right when asserted by Nazis, so too the right to be free from discrimination does not become a special right of minorities, women, lesbians, or gay men, just because these constituencies struggle to secure it.

I do not mean to suggest that the ACLU has always held exactly the same positions as it does today. Certainly, over time the ACLU has expanded its conception of fundamental rights, much as the United States Supreme Court has done. For example, we did not always take the position that the death penalty inherently constitutes cruel and unusual punishment[13] or that a woman has a fundamental right to choose an abortion.[14] But, from the beginning, we did have an overarching goal of defending all fundamental rights for all people.

It is, therefore, wholly inaccurate to say that the ACLU has only recently expanded its agenda to defend other rights beyond free speech. Moreover, the other fundamental rights that the ACLU has vigorously advocated since its founding include the equality rights of racial minorities, women, and other traditionally oppressed groups. This is an aspect of our history that I have studied and written about, and of which I am very proud.[15] I am pleased to recount a few of the early highlights of this extensive and continuing history.

In the early years of the civil rights movement, the ACLU worked closely with lawyers from the NAACP to plan the attack on segregation.[16] In 1931, the ACLU published a comprehensive report on legalized racism entitled *Black Justice*.[17] We also played an important role in the infamous

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traditional minority and individual rights." AMERICAN CIVIL LIBERTIES UNION, THE FIGHT FOR FREE SPEECH: A BRIEF STATEMENT OF THE PRESENT CONDITIONS IN THE UNITED STATES, AND OF THE WORK OF THE AMERICAN CIVIL LIBERTIES UNION AGAINST THE FORCES OF SUPPRESSION 4 (1921). The statement enumerated two specific components of the ACLU's resistance to reaction: "first, activities looking toward a reorganization of our economic and political life, and second, the demand for the 'rights' of those minorities and individuals attacked by the forces of reaction." *Id.* at 5.

[13] For the ACLU's current position see the AMERICAN CIVIL LIBERTIES UNION POLICY GUIDE, Policy No. 239 (1993) [hereinafter ACLU POLICY GUIDE].

[14] The ACLU National Board adopted a policy affirming the right of women to have an abortion in 1967. *See* Nadine Strossen, *Essay: The American Civil Liberties Union and Women's Rights*, 66 N.Y.U. L. REV. 1940, 1948 (1991); WALKER, *supra* note 7, at 302.

[15] *See* Strossen, *supra* note 14; Strossen, *supra* note 8, at 550–54; Mary Ellen Gale & Nadine Strossen, *The Real ACLU*, 2 YALE J.L. & FEMINISM 161 (1989).

[16] WALKER, *supra* note 7, at 89.

[17] *Id.* at 88. It is not surprising to note that, far from limiting itself to a discussion of free speech rights, *Black Justice* addressed, among other topics, the right to vote, the right to marry, the right to an education, the right to equal access to public accommodations, and the right to choose unsegregated housing. *See* AMERICAN CIVIL LIBERTIES UNION, BLACK JUSTICE (1931).

Scottsboro cases in the early 1930s in which nine young black men were charged with raping two white women after sham trials before all-white juries.[18] It was an ACLU attorney, Walter Pollack, who argued and won the first of those cases to reach the Supreme Court.[19]

During World War II, the ACLU sponsored a challenge to the segregated draft and organized the Committee Against Racial Discrimination.[20] In the 1950s, the ACLU successfully challenged state laws that made it a crime for a white woman to bear a child she had conceived with a black father,[21] and in the 1960s the ACLU fought for and won many civil rights victories, including a landmark ruling in *Loving v. Virginia*,[22] which struck down laws criminalizing inter-racial marriages.

Our historic record on behalf of women's rights is equally impressive. Since our founding, we have consistently championed the rights of women, even when few others were doing so. Way back in 1922, we defended the distribution of a birth control pamphlet written by one of our founding mothers, Mary Ware Dennett, after the Postal Service banned it as "obscene."[23] In 1937, we fought for the right of schoolteachers on maternity leave to be reinstated in their jobs after their children were born.[24] In the 1940s, the ACLU established the Committee on Discrimination Against Women, which supported legislation guaranteeing equal pay for equal work and opposed laws prohibiting birth control devices and information regarding their use. During this decade, the ACLU also challenged a Massachusetts law prohibiting married women from teaching in public schools.[25]

In the 1960s, the ACLU played a leading role in the then new movement for women's reproductive freedom. In 1965, the ACLU joined Planned Parenthood in the landmark case of *Griswold v. Connecticut*,[26] which struck down a state prohibition on the prescription, sale, or use of contraceptives. In 1967, we became the first national organization to call for the right of all women to terminate an unwanted pregnancy.[27]

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[18] For a history of the Scottsboro cases see DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (1969).

[19] Powell v. Alabama, 287 U.S. 45 (1932) (reversing for inadequate assistance of counsel in a capital case); *see also* Patterson v. Alabama, 294 U.S. 600 (1935) (remanding because exclusion of blacks from jury denied defendant equal protection).

[20] WALKER, *supra* note 7, at 163.

[21] *See ACLU's Thirty-Six Year Fight for Women's Rights*, ACLU WOMEN'S RIGHTS REPORT, Spring 1980, at 2, 3.

[22] 388 U.S. 1 (1967).

[23] *See* Strossen, *supra* note 14, at 1947; WALKER, *supra* note 7, at 84–86.

[24] *See* Strossen, *supra* note 14, at 1947; WALKER, *supra* note 7, at 167.

[25] *See* Houghton v. School Comm. of Somerville, 28 N.E. 2d 1001 (Mass. 1940).

[26] 381 U.S. 479 (1965).

[27] *See* Gale & Strossen, *supra* note 15, at 164; Strossen, *supra* note 14, at 1948; WALKER, *supra* note 7, at 302.

The ACLU's long-standing work on behalf of African Americans and women illustrates our historic commitment to defending the rights of *all* people who are victims of discrimination based on membership in certain societal groups. This commitment is also manifested in our ardent advocacy of lesbian and gay rights. I am very proud that we have been praised in the gay press as the first so-called "mainstream" organization to advocate lesbian and gay rights when there were very few specialized organizations focusing on that cause.[28] In the 1950s, the ACLU opposed specific violations of the rights of lesbians and gay men, including police entrapment of gay men and the proposed compulsory registration of gay people.[29] In 1966, the ACLU formally endorsed the broader principle that individuals should not be deprived of rights because of their sexual orientation and in 1973 launched the Sexual Privacy Project to fight all forms of discrimination against lesbians and gay men.[30]

The preceding overview of ACLU history demonstrates that the second premise of the "rights-versus-liberties" critique is, like the first, without foundation. There simply is no irreconcilable conflict between so-called "classic civil liberties" and so-called "civil rights." Specifically, free speech is not incompatible with the equality rights of groups that have traditionally suffered discrimination.

The myth of irreconcilable conflict assumes that there is something special about the relationship between free speech and equality rights that sets it apart from relationships among other rights. This assumption encompasses two basic misconceptions. First, it presumes that equality rights are different from other rights because they, unlike others, can conflict with free speech. Second, it presumes that equality rights are *necessarily* and *consistently* in tension with free speech. Both of these presumptions are wrong.

First, *all* rights can come into conflict with *all* other rights, and often do. Even within the realm of what self-described "civil liberties purists" call classic civil liberties, there are conflicts. For example, we often wrestle with tensions between free speech and privacy, between free speech and due process, and between free speech and non-establishment of religion. Yes, equality rights *are* sometimes in tension with free speech, but that does not distinguish them from any *other* rights.

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[28] *See, e.g.*, Robin Kane, *Helms, Dannemeyer Help Build Pro-Gay Coalitions*, WASH. BLADE, May 11, 1990, at 1, 6 ("the ACLU has led the nation's non-Gay organizations in supporting Gay rights since its initial involvement with Gay issues in the late 1950s."). For a concise account of the development of the ACLU's policy on lesbian and gay rights, see WILLIAM A. DONOHUE, THE POLITICS OF THE AMERICAN CIVIL LIBERTIES UNION 281–85 (1985). For the current ACLU policy on sexual orientation, see ACLU POLICY GUIDE, Policy No. 264 (1993).

[29] WALKER, *supra* note 7, at 312.

[30] *Id.*

Because the ACLU is committed to respecting all rights, it must make accommodations among different rights if and when they conflict. In making this accommodation, we accord the freedom of speech great deference, deference that is required by the Constitution and that we strongly believe is indispensable in a free and humane society. Nonetheless, we are not now willing, nor have we ever been willing, to sacrifice or ignore other fundamental freedoms, or the equality rights of some members of our society, in order to pursue an unyielding defense of free speech.

Second, the fact that equality rights *sometimes* are in tension with free speech does not mean that equality rights are *inevitably* or even *usually* in conflict with free speech. To the contrary, free speech and equality rights often go hand in hand. Frequently, a denial of one is also a denial of the other, as when unequal treatment takes the form of silencing.[31] This interrelationship between free speech and equality is vividly illustrated by the Pentagon's "new" policy on lesbians and gay men, who now may not be drummed out of the service because of their sexual orientation alone, but who may still be drummed out for revealing that orientation. As the ACLU/Lambda lawsuit[32] challenging this policy has recognized, the policy violates both free speech and equality rights.

This interrelationship between free speech and equality also underlies the ACLU's opposition to many other attempts to restrict speech. We oppose campus "hate speech" codes[33] both because they inhibit free speech[34] and because they do not meaningfully promote and may in fact

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[31] *See* William B. Rubenstein, *Since When Is the Fourteenth Amendment Our Route to Equality?: Some Reflections on the Construction of the Hate Speech Debate from a Lesbian/Gay Perspective*, 2 LAW & SEXUALITY 19, 23–24 (1992); Paul Siegel, *Lesbian and Gay Rights as a Free Speech Issue: A Review of Relevant Caselaw*, 21 J. HOMOSEXUALITY 203, 204, 251 (1991).

[32] Doe v. Aspin, Civil Action No. 93-1549 (D.D.C. filed July 27, 1993). *See also Gay Policy Draws Fire*, NAT'L L.J., Aug. 9, 1993, at 6; Dimitra Kessenides, *Pro Bono*, AM. LAW., Oct. 1993, at 98. In an earlier lawsuit brought by the ACLU and Lambda, Pruitt v. Cheney, 963 F.2d 1160 (9th Cir.) *cert. denied*, 113 S. Ct. 655, (1992), the Ninth Circuit was able to avoid ruling on whether a discharge based on a statement that a person is homosexual violates the First Amendment because, under the old policy, it was the status of being gay or lesbian, and not speaking the words, that was grounds for discharge.

[33] *See infra* pp. 155–56.

[34] The ACLU has successfully challenged several campus hate speech codes as violative of the First Amendment. Although some challenges were resolved through negotiation, two resulted in the only two judicial rulings on such codes. *See* Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989) (permanently enjoining the part of the code restricting speech but denying an injunction as to the code's regulation of conduct); UWM Post, Inc. v. Board of Regents of the University of Wisconsin System, 774 F. Supp. 1163 (E.D. Wisc. 1991) (striking down University of Wisconsin code as overbroad and unduly vague). Although the Supreme Court has yet to rule on campus speech codes, its decision in R.A.V. v. St. Paul, 112 S. Ct. 2538 (1992), suggests that codes that explicitly prohibit specific ideas are not constitutional. The St. Paul ordinance at issue in the case cited cross burnings and Nazi swastikas as specific examples of prohibited expression.

undermine equality of opportunity. In terms of promoting equality, censoring hate speech is at best ineffective, and at worst counterproductive, for the following reasons: censorship increases attention to, and sympathy for, bigots; it drives bigoted expression underground, thus making effective responses more difficult; it is a powerful, discretionary tool, which government enforcement authorities consistently have used disproportionately to repress the speech of the very minority groups that the measures are intended to protect; it reinforces paternalistic stereotypes about members of minority groups; it generates a backlash of ill-will toward the minority groups that are perceived to be the proponents or causes of censorship; and it diverts resources from measures addressing discriminatory attitudes and conduct.[35]

Similarly, when we oppose those, such as Andrea Dworkin and Catharine MacKinnon, who would censor misogynistic "pornography" and who argue that this censorship fosters women's equality,[36] we do so because such censorship schemes are doubly flawed. First, they contravene free speech principles. Second, they undermine women's equality rights by giving government officials a powerful tool for suppressing works by and about feminists and lesbians; by perpetuating demeaning stereotypes about women, including that sex is bad for us; by perpetuating the disempowering image of women as victims; by distracting us from constructive approaches to reducing discrimination and violence against women; and by undermining free speech, thereby depriving feminists of a powerful tool for advancing women's equality.[37] To the extent that some pornography may communicate a misogynistic message, the ACLU maintains, consistent with our commitment to women's equality, that women are perfectly capable of rejecting that message for themselves and successfully urging men to reject it as well.

The often positive interrelationship between free speech and equality—and between censorship and inequality—reflects the fact that free speech and equality, at bottom, are simply different aspects of the same broader underlying values: respect for individual autonomy and dignity and for societal diversity and pluralism. In a society that respects the autonomy and dignity of individuals, all people would be free to express their views, no matter what their views or who they were. Likewise, in a society that respects diversity and pluralism, all individuals would be free

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[35] *See* Strossen, *supra* note 8, at 554–69 (arguing that means consistent with the First Amendment could promote racial equality more effectively than censorship). *See also* Henry Louis Gates, Jr., *Let Them Talk*, NEW REPUBLIC, Sept. 20 & 27, 1993, at 37.

[36] *See* sources cited *supra* note 9.

[37] *See* Nadine Strossen, *A Feminist Critique of "the" Feminist Critique of Pornography*, 79 VA. L. REV. 1099 (1993). For the text of the ACLU's policy on pornography see ACLU POLICY GUIDE, Policy No. 4 (1993).

to express any ideas, regardless of whether the speaker or the idea diverged in any way from the societal norms.

The multiple positive interconnections between free speech and equality demonstrate that, contrary to the third premise of the "rights-versus-liberties" critique, the ACLU *can* vigorously defend liberty at the same time that it defends equality. Indeed, we cannot adequately defend either unless we vigorously defend both. I believe it is conceptually impossible for a dedicated human rights advocate even to draw a meaningful distinction between liberty and equality, let alone to see them as being somehow inalterably in opposition to each other. How could we possibly claim to have secured individual liberty if some individuals are denied liberty because they belong to certain societal groups? Conversely, how could we possibly claim to have secured meaningful equality for all groups of people if that equality does not encompass the exercise of individual freedom?

Constitutional law professor Kenneth Karst has explained well the symbiotic relationship between liberty and equality—between civil liberties and civil rights.

> [T]he constitutional values of equality and liberty are fundamentally linked by the notion that equal access to certain institutions and services is a prime component of any meaningful liberty. This link is reflected in the language of egalitarian movements. The civil rights movement of the 1960s, for example, marched under the banner of "Freedom" even though its chief objective was equal access—to the vote, to education, to housing, even to lunch counters. "Liberation" is today a theme of more than rhetorical significance in egalitarian causes such as the women's movement.[38]

The interdependence of liberty and equality points to the falsity of the fourth plank in the "rights-versus-liberties" attack, that one should not in theory and cannot in practice balance free speech against any other rights. Free speech is not, as some assert, absolute, and the ACLU has never taken such a position. Nonetheless, the ACLU proudly bears the label "free speech absolutist." The parameters of the free speech debate are such that even those who are described as "free speech absolutists" or "purists" do not argue that all words and expressive conduct are absolutely protected. In truth, the only argument between free speech absolutists and others is not over *whether* speech can be regulated, but only over

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[38] Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 43–44 (1975).

when it can be regulated.[39] Absolutists impose a heavier burden of proof on those who seek to justify speech restrictions.[40]

As free speech purists, we in the ACLU always have maintained that speech may be restricted only when necessary to promote a countervailing goal of compelling importance, such as preventing violence. Unlike our critics, we view other fundamental rights as possessing such compelling importance. Therefore, if restricting speech is necessary to protect those rights, we will not oppose restricting speech. For example, our very speech-protective policy on campus hate-speech codes recognizes that some speech could and should be punished. Even Nat Hentoff, despite his criticism that the ACLU is veering away from his conception of free speech absolutism,[41] has praised this policy.[42] Specifically, that policy includes the following qualification:

> This policy does not prohibit colleges and universities from enacting disciplinary codes aimed at restricting acts of harassment, intimidation and invasion of privacy. The fact that words may be used in connection with otherwise actionable conduct does not immunize such conduct from appropriate regulation.[43]

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[39] Even Nat Hentoff himself, a self-professed free speech purist, advocates speech restrictions to protect countervailing rights that he considers particularly important. This became clear during a recent radio debate that I had with him. After Hentoff had denounced the ACLU for allegedly departing from a purist defense of free speech, and I had rebutted that attack, we answered calls from listeners. As usual, virtually all the callers who criticized the ACLU complained that we were *too* zealous in defending various forms of unpopular speech. One such call predictably attacked our position on child pornography: namely, that those who actually exploit children in producing sexually explicit works should be punished, but those who merely view such works should not be. *See* ACLU POLICY GUIDE, Policy No. 4 (1993). To my amazement, Hentoff—who a minute before had been arguing that free speech should never be limited to promote any countervailing value—agreed with this caller. He criticized the ACLU's defense of the right to view sexually explicit pictures of children and expressed his overriding concern for the privacy rights of the children shown in these works. Even such an outspoken free speech purist as Nat Hentoff compromised free speech in a situation where the ACLU does not.

[40] Landmark Supreme Court decisions likewise hold that speech may be restricted only under limited, extraordinary circumstances. *See* R.A.V. v. St. Paul, 112 S. Ct. 2538 (1992); Cohen v. California, 403 U.S. 15 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969); New York Times v. Sullivan, 376 U.S. 254 (1964).

[41] *See* sources cited *supra* note 3.

[42] *See* Nat Hentoff, *The ACLU and Mr. Hyde*, WASH. POST, Mar. 23, 1991, at A21.

[43] ACLU POLICY GUIDE, Policy No. 72a (1993) (footnotes omitted). The footnotes accompanying this portion of the policy explain:

> Although "harassment," "intimidation," and "invasion of privacy" are imprecise terms susceptible of impermissibly overbroad application, each term defines a type of conduct which is legally proscribed in many jurisdictions when directed at a specific individual or individuals and when intended to frighten, coerce, or unreasonably harry or intrude upon its target. Threatening telephone calls to a minority student's dormitory room, for example, would be proscribable conduct under the terms of this policy. Expressive behavior which has no other effect than

The graduation prayer controversy provides another good example. Those who advocate school-sponsored prayer by students or other speakers at public school commencement ceremonies argue that such prayer is protected free speech. But we have consistently maintained that this speech has to be limited in order to protect the rights of graduating students to be free from government-endorsed religion as guaranteed by the Establishment Clause.[44] Certainly, abiding by the Establishment Clause, far from being a "trendy" liberal cause, is a compelling interest whose historic importance matches that of free speech, its companion in the First Amendment.

Similarly, the ACLU National Board cannot fairly be said to have abandoned the First Amendment by failing to defend the particular speech involved in *Wisconsin v. Mitchell*,[45] a case recently decided by the Supreme Court. In *Mitchell*, the defendant and his friends were young African-American men who, stirred by *Mississippi Burning*, the movie they had just seen, were discussing their anger against whites. The defendant said to his friends, "Do you feel hyped up to move on some white people?" When he spotted a white boy walking across the street, the defendant said to his companions, "There goes a white boy; let's go get him." He then counted to three and pointed in the boy's direction. The group immediately ran toward the boy and subjected him to a near-fatal beating.[46] If that speech was not intentional, imminent incitement to violence, which is as unprotected under ACLU policy as it is under Supreme Court precedents, I do not know what would be.

Although I want to emphasize that the ACLU necessarily does balance and always has balanced free speech and other fundamental rights, as an inevitable incident of defending all such rights, I do not mean to suggest that deciding when and how to do so is always easy. In difficult cases involving tensions between rights, those of us within the ACLU will strike somewhat different balances as we strive to give maximum protection to all of the rights at stake. There will be dissenting votes and some units of the organization will disagree with others.

Though I do not want to overlook these occasional, though inevitable, difficulties, I am concerned that the recent spate of publicity focusing on ACLU board debates over several especially complex issues, in which the

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to create an unpleasant learning environment, however, would not be the proper subject of regulation.

Id. at 142a n.3. The notes also state that "intimidating telephone calls, threats of attack, extortion and blackmail are unprotected forms of conduct which include an element of verbal or written expression." *Id.* at 142b n.1.

[44] *See* ACLU POLICY GUIDE, Policy No. 81 (1993).

[45] 113 S. Ct. 2194 (1993).

[46] *Id.* at 2196–97.

tensions among competing civil liberties concerns are particularly acute, has distorted the degree of disagreement among us for two reasons.[47] First, the distortion results from a failure to recognize that the policy issues that our national and state boards debate include the hardest issues that we face. That is why we debate them. But the vast preponderance of what we do, as opposed to what we debate, involves implementing long-established, widely accepted civil liberties policies and principles.

Moreover, even on the difficult policy issues, the disputes tend to be only at the margins, often on abstract propositions or hypothetical cases. If, instead of focusing on the margins, we take a broader view of the entire free speech spectrum, it is apparent that the ACLU's national and state board members, and indeed all others in the civil liberties camp, take positions very close to each other at the absolutist end of the range. This means that with regard to most actual cases, we enjoy a very broad consensus as to which position best accords with civil liberties principles.

In short, even when civil libertarians disagree with each other about abstract policy formulations, we may still agree about the proper outcome in the cases we actually confront. For example, in 1990 the ACLU's three California affiliates adopted policies that would, in principle, tolerate campus hate speech codes that are somewhat more restrictive than those that the national policy would tolerate.[48] Some "free speech purists" who have accused the ACLU of getting soft on free speech have pointed to the hate speech policies of the ACLU's California affiliates as demonstrating this alleged drift.[49] Yet even the theoretical differences among the policies are negligible, since all are near the absolutist end of the free speech spectrum. Moreover, when we turn from theoretical discussions to practical actions, the differences among the policies fade from negligible to non-existent. In practice the slightly differing policies have had no actual impact on ACLU programs or action because all campus hate speech codes that California universities have actually adopted are restrictive

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[47] *See* sources cited *supra* note 1.

[48] The National Board's policy, quoted above, while recognizing that colleges and universities may restrict "acts of harassment, intimidation and invasion of privacy," also cautions that "[e]xpressive behavior which has no other effect than to create an unpleasant learning environment . . . would not be the proper subject of regulation." ACLU POLICY GUIDE, Policy No. 72a n.3. In slight contrast, the California affiliate's policy that apparently has the broadest definition of unprotected speech, the one maintained by the ACLU of San Diego and Imperial Counties since 1990, condones the prohibition of hate speech that is addressed to particular individuals and intentionally harasses them, when such speech "creates a hostile and intimidating environment which the speaker knows or reasonably should know will seriously and directly impede the educational opportunities of the individual or individuals to whom it is addressed." AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO AND IMPERIAL COUNTIES, POLICY CONCERNING HARASSMENT ON COLLEGE CAMPUSES (1993).

[49] *See, e.g.*, Nat Hentoff, *Battling Speech Police*, WASH. POST, Oct. 27, 1990, at A24. *See also* Hentoff, *supra*, nn.2–3, 42.

enough to violate all of the California affiliates' policies as well as the national policy. For example, the University of California's code sanctions students for saying things that the speaker "should reasonably know will interfere with the victim's ability to pursue effectively his or her education or otherwise to participate fully in University programs and activities."[50] The California affiliates oppose the code, just as the national office does, because its broad wording reaches far beyond the realm of legitimately unprotected speech and punishes and deters much speech that should be constitutionally protected.

As another example, consider the issue of so-called "hate crimes," which I think are more accurately described as "discriminatory crimes." Several of the ACLU's state-based affiliates have taken the position that First Amendment values are inherently undermined by all laws that impose added penalties for crimes whose victims are selected on a discriminatory basis.[51] In contrast, the ACLU's National Board has concluded that *some* applications of *some* such laws would not *necessarily* be unconstitutional, *if* they were narrowly crafted and carefully applied so as not to jeopardize First Amendment rights. Most important, the national policy emphasizes that expression may not be considered as evidence that the victim was selected on an intentionally discriminatory basis unless the expression was tightly and directly linked to the underlying crime, as it was in the *Mitchell* case.[52] In practice, though, most enhanced penalty laws have not been crafted and applied with sufficient respect for First Amendment values and therefore the national ACLU has opposed them.

The foregoing examples of situations where the ACLU has accepted the difficult challenge of formulating positions that respect free speech *and* other fundamental rights, bring us to the fifth and final plank in the "rights-versus-liberties" critique. This plank urges the ACLU to "go back" to defending only civil liberties and to leave the defense of civil rights, with all of its attendant complications, to other organizations. This sug-

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[50] UNIVERSITY OF CALIFORNIA, UNIVERSITYWIDE STUDENT CONDUCT: HARASSMENT POLICY, § 51.00 (1993) (enacted Sept. 21, 1989).

[51] *See, e.g.*, Amicus Brief of the American Civil Liberties Union of Ohio in Support of Respondent at 4, Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993) (No. 92-515) ("laws such as Wisconsin's are conceptually infirm at their root: they seek to prevent harms to certain groups, via the minds and words of the alleged perpetrator. In the view of the ACLU of Ohio, such a 'detour' is not constitutionally permissible, particularly in light of the fact that the conduct which is properly the object of state sanctions is already punished under generally applicable laws.").

[52] *See* ACLU POLICY GUIDE, Policy No. 242b (adopted Jan. 24, 1993) ("If properly drawn, such laws do not punish protected speech or associations; rather, they reflect the heightened seriousness with which society treats criminal acts that also constitute invidious discrimination and are intended to or have the effect of depriving persons of legal rights or of the opportunity to participate in their community's political or social life simply because of their race, religion, gender, national origin, sexual orientation, or other group characteristic.").

gestion ignores the special role that the ACLU has played and should continue to play in the defense of rights in American society.

As I noted above, from our earliest days, the ACLU has strived to defend all fundamental rights for all people. This broad, neutral agenda sets the ACLU apart from all other organizations and is the reason why the ACLU continues to play an essential role in American society. Our uniquely comprehensive human rights agenda gives the ACLU a special responsibility, as well as a special opportunity, to influence government decisions that attempt to respect and accommodate various rights.

Other organizations which define themselves either in terms of particular rights, such as free speech, religious freedom, or reproductive freedom, or the rights of particular people, such as the rights of various racial or religious groups, of women, or of lesbians and gay men, need not hammer out the relationships between different rights and liberties. They are free to privilege the particular right or rights that are of greatest interest to them.

In contrast, the ACLU's unique mission to defend all rights neutrally, for all people, prohibits us from engaging in such privileging where there are tensions among different rights. We could not single-mindedly promote free speech and remain true to our organizational mission any more than the Supreme Court could do so and remain true to the Constitution. Just as judges and other government officials must struggle to respect all rights, so too must the ACLU give these officials guidance on what those courses should be.

By staking each of our particular positions on the principle that all rights for all people are indivisible, each gains a special credibility and power. We speak from a moral and intellectual high ground, rather than from a special, personal interest on the part of our members. We would forfeit these strengths were we to become just another advocacy group arguing for the rights that most directly benefited ourselves.

I do not mean to be critical of organizations that have narrower agendas, closer to the direct self-interest of their members—more power to them and to the important causes they champion. The ACLU, though, adds a unique and especially persuasive voice to their causes precisely because we advocate those causes not out of self-interest but rather out of principle.

This point has been forcefully made by the newest Supreme Court Justice, Ruth Bader Ginsburg. She carried out her pioneering women's rights litigation, which has led many to dub her "the Thurgood Marshall of the women's rights movement," as the founding director of the ACLU Women's Rights Project. She deliberately chose the ACLU as the vehicle for her activism, rather than an organization with a narrower women's rights agenda, in large part because she believed that the ACLU would enhance the credibility of the women's rights cause. Justice Ginsburg has

also said that she chose the ACLU because of the integral interconnection between civil liberties and civil rights, including women's rights. "I wanted to be a part of a general human rights agenda . . . [promoting] the equality of all people and the ability to be free."[53]

A passage from a speech by Abraham Lincoln eloquently captures my vision of the ACLU's special mission of bringing our society ever closer to the interrelated ideals of liberty *and* equality that were set out in the Declaration of Independence. What Lincoln said about the expansive reach of those founding national ideals also applies fully to the ACLU's founding ideals and ongoing accomplishments. Lincoln said, and I echo:

> [T]he authors of [the Declaration of Independence] . . . did not intend to declare all men equal in all respects . . . . They . . . did consider all men created equal in "certain inalienable rights . . . ." . . . . They did not mean to assert the obvious untruth, that all were then actually enjoying that equality . . . . They meant simply to declare the right, so that the enforcement of it might follow . . . . They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.[54]

Although the United States has advanced far closer to the ideal of equal, inalienable rights for all than it was when Lincoln uttered these inspiring words—and although I take pride in the large role that the ACLU has played in that development—this ideal remains elusive. Thus, the ACLU must maintain the "constant labor" for which Lincoln called on behalf of the equal and inalienable rights of all people. As has been recognized by the Declaration of Independence and Abraham Lincoln, we are all entitled to both liberty and equality, to civil rights as well as civil liberties.

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[53] *ACLU's Thirty-Six Year Fight for Women's Rights*, *supra* note 21, at 5.

[54] Abraham Lincoln, Speech in Springfield, Illinois (June 26, 1857), *in* ABRAHAM LINCOLN: COMPLETE WORKS 232 (John G. Nicolay & John Hay eds. 1894).